Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption	WC Docket No. 09-152

PETITIONERS' OPPOSITION TO MOTION OF QWEST COMMUNICATIONS COMPANY, LLC TO SUSPEND COMMENT SCHEDULE

Great Lakes Communication Corp. and Superior Telephone Cooperative (collectively, the "Petitioners"), by their undersigned counsel and pursuant to 47 C.F.R. § 1.45, hereby submit this Opposition to the Motion of Qwest Communications Company, LLC to Suspend Comment Schedule ("Motion"). Qwest's Motion is disingenuous and should be rejected. Aside from misstating the relief sought by the Petitioners, Qwest alleges that the Petition "is based entirely on Great Lakes' recollection of the Iowa Utilities Board's public hearing and its characterizations of Qwest's proposed findings of fact and conclusions of law in that Iowa proceeding." Motion at 1. Great Lakes' "recollections" are, however, very accurate according to the attached transcript of the August 14, 2009 IUB Decision Meeting ("Transcript") which Qwest has filed in at least two federal courts. **Exhibit A.**[1] Moreover, they are based in the written Issues List circulated by the Board prior to the Decision Meeting. **Exhibit B.** In addition, as Petitioners demonstrated in their filing in this docket on September 2, 2009, their "characterizations" of Qwest's "proposed

[1] It appears that Qwest prepared the transcript. It characterizes it as "an unofficial transcript of the tape recorded open session of the Board's August 14, 2009 decision meeting." **Exhibit D.** Thus, even if the transcript is not an "official" document prepared by the IUB, Qwest has filed this document in federal courts and thus we must presume that it is reliable, else Qwest has violated its duty of candor and Fed. R. Civ. P. 11.

findings of fact and conclusions of law" are accurate; indeed most of them are direct quotes from Qwest's pleading.[2]

Qwest also asserts that Iowa Utilities Board ("IUB") has not undertaken a reviewable action in Docket FCU 07-2, *Qwest Communications Corp. v. Superior Telephone Cooperative* (Iowa Utils. Bd.). That assertion is false, as the Transcript amply demonstrates. That assertion also is disproven by the representations of Qwest — the very same corporate entity that filed the Motion — in federal courts that the IUB has ruled in Qwest's favor. **Exhibits C, D, and E.**

1. On August 14, 2009, the IUB announced its final decisions on all of the issues that Qwest raised, often improperly, during the course of that complaint proceeding. All Board Members were present, each spoke, and each voted in favor of many findings of fact, conclusions of law, and determinations of liability. These findings, conclusions, and determinations include:[3]

- The Commission's decision in *Jefferson Telephone*[4] "does not preclude" the IUB "from addressing this issue" of what constitutes termination of calls. Transcript at 1.
- The *Farmers and Merchants Order* is not a final decision, and the IUB "has a more complete record than what was before the FCC." *Id.*
- The Iowa LEC Respondents did not "treat" the conference call and chat line service providers "like end users" but rather "acted like they were in a joint business venture." *Id.*
- The filed tariff doctrine does not apply to the question whether Qwest should have paid the terminating access charges for which it received invoices from the Iowa LEC Respondents. *Id.*

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[2] WC Docket No. 09-152, Letter from Ross A. Buntrock to Marlene H. Dortch (Sept. 2, 2009) (appending Great Lakes Communication Corp. and Superior Telephone Cooperative Reply in Support of Motion for Stay, Docket FCU 07-2 (Sept. 1, 2009)).

[3] In referencing or replicating the decisions of the IUB, Petitioners are not conceding their lawfulness under any standard of review or applicable law.

[4] *AT&T Corp. v. Jefferson Tel. Co.*, Memorandum Opinion and Order, 16 FCC Rcd. 16130 (2001).

- The conference call and chat line service providers "were not subscribing end users within the meaning of the term as it is used in the Respondents' access tariffs." Transcript at 2.[5]

- "[T]he traffic was not terminated at the end users [sic] premises in a manner that satisfies the requirements of the Respondents' access service tariffs." *Id.*; *see infra* n.2.

- As to the international calls handled by some of the Iowa LEC Respondents, "none of these calls were actually terminated in the Respondent exchanges, thus terminating access charges should not have been assessed to these calls." *Id.*

- With regard to calls placed to Great Lakes and Superior, "the ... traffic was not terminated in the respective Respondents certificated local exchange area and access charges could not be applied on those calls." Transcript at 3.

- Respondents must refund to Qwest, AT&T, and Sprint "the amount of the illegal access charges they were billed by and paid to the Respondents." *Id.*[6]

- "[T]he evidence in our record would support a finding that Great Lakes failed to satisfy the requirements for the rural exemption in its claim." Transcript at 6.[7]

- Qwest's unilateral decision in 2006 to refuse to pay invoiced access charges will not be sanctioned, because "no money is owed by Qwest to the Respondents[.]" Transcript at 7.

These statements are decisions. They were made at the IUB "Decision Meeting." Transcript at 1. The IUB issued them, each Member agreed with them and

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[5] Note that the IUB does not identify the access tariffs on which it relied (intrastate or interstate), thus illustrating why Petitioners were forced to seek the Commission's ruling that the IUB is limited to deciding matters of intrastate tariffs, services, and revenues. In addition, Petitioners note that they filed a Motion to Exclude Evidence in the Iowa case on November 11, 2008, requesting that the Board exclude evidence regarding, among other things, interstate and international calls. The Board denied that motion *in toto* on November 26, 2008, stating that "QCC's initial complaint is sufficiently broad to relate to the categories of evidence raised by the Respondents." Docket FCU 07-2, Order Denying Motion to Exclude Evidence (Nov. 26, 2008).

[6] That amount will be determined after review of documentation that these carriers must submit (Transcript at 3); no IXC previously had submitted documentation evidencing the amounts they were wrongfully billed, though each IXC requested — and now have received — an order requiring refunds.

[7] On this one point the Board notes that "[o]ur jurisdiction in that matter is limited to intrastate access charges." *Id.* The Board stated, however, that "we should refer to issue to the FCC." Regardless of any "referral," the Board here issued yet another final conclusion.

voted on them, and they were proclaimed in a public meeting. These decisions are reviewable, and indeed must be reviewed by the Commission to address the IUB's improper aggrandization of authority over interstate communications as well as its contravention of settled federal law and policy.

2. Qwest itself has represented several times to federal courts that the IUB has made decisions on issues relating to LEC terminating access, including on the very same day it filed its ill-conceived Motion. Yet before the Commission it now purports that the parties cannot "properly analyze what the Iowa Board did," nor can the Commission "determine how the Iowa Board's actions fit within the dual federal/state scheme," until the written order has been released. Motion at 2. These positions cannot be reconciled — Qwest's federal court advocacy is the polar opposite of its FCC advocacy. This being so demonstrably the case, as shown below, it is stunning that Qwest goes so far as to accuse Petitioners' counsel of a lack of candor[8] when its own conduct is so highly questionable.

a. On September 10, 2009, Qwest filed a proposed "Surreply to Reply in Support of Sancom and Free Conferencing Corporation Motions for Summary Judgment" in the case styled *Sancom, Inc. v. Qwest Communications Corp.*, Case No. 07-4147-KES (D.S.D. Oct. 9, 2007). The final Surreply was filed yesterday, September 15. **Exhibit C**. The Surreply was filed in federal court **on the same day** as Qwest filed the Motion here at the Commission. In its Surreply, Qwest makes numerous assertions in reliance on the "decisions" reached by the IUB on August 14:

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[8] *See* WC Docket No. 09-152, Preliminary Statement for the Record of Qwest Communications Company, LLC (Aug. 28, 2009).

- "Both the FCC and the Iowa Utilities Board have found these cases inapposite to traffic pumping disputes." Surreply at 2.[9]
- "In its verbal decision, the Iowa Board also rejected reliance on *Jefferson*." Surreply at 3.
- "The August 14, 2009 verbal decision of the Iowa Utilities Board for instance held that 'the conference companies did not own or lease or otherwise control the premises where the conferencing equipment was installed, supporting the finding that calls are not being terminated at the end user premises.'" Surreply at 10 (quoting Transcript).
- "Throughout the Iowa proceeding, **Qwest argued (successfully)** that for switched access to apply, calls must be delivered to an end user ... ." Surreply at 9 (emphasis added).

Plainly the IUB's statements cited and quoted by Qwest in the Surreply constitute final decisions, and Qwest itself is relying on them before the District of South Dakota. Moreover, Qwest appended the Transcript to the Surreply to demonstrate to the Court that the IUB ruled in its favor. And in the last item quoted above, Qwest is telling the District of South Dakota that it won before the IUB. For Qwest to assert to the Commission, on the same day, that the IUB decision "has not been released" (Motion at 1) or cannot be "analyzed" (*id.* at 2) is shameful and outrageous.

b. The Surreply is not the first time that Qwest has relied on the August 14 IUB Decision Meeting as *stare decisis* supporting its refusal to pay tariffed terminating access charges. On August 31, 2009, again in the *Sancom* case before the District of South Dakota, Qwest asserted the following:

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[9] "These cases" refers to *Jefferson Telephone*, *Frontier Communications*, and *Beehive Telephone*. *Jefferson Tel.*, 16 FCC Rcd. 16130 (2001); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd. 4041 (2002); *AT&T v. Beehive Tel. Co.*, Memorandum Opinion and Order, 17 FCC Rcd. 11641 (2002). Though the IUB did not speak to the applicability of *Frontier* or *Beehive*, it did rule on August 14 that "Jefferson Telephone does not preclude us from addressing this issue" of what constitutes the termination of traffic. Transcript at 1.

- "Qwest's position was recently validated by the Iowa Utilities Board ("Board") in a verbal decisional [*sic*] meeting on August 14, 2009. In that meeting, the Board stated the Merchants decision was not final, that the Board had the more complete record and better ability to assess the facts, and strongly suggested it found the *Merchants* decision was procured by manufactured evidence." Qwest's Statement of Facts Replying to Sancom's Statement of Facts on Qwest's Motion for Summary Judgment at 6 (**Exhibit D**) (noting that the Transcript is appended).[10]

- "The Board concluded that the [conference call and chat line service providers] were not end users of the eight Iowa LECs (under their local and intrastate tariffs) who were respondents to the case[.]" *Id.*[11]

- "The Board concluded ... that none of the calls were delivered to an end user premises, that the [companies] were akin to business partners, and that Qwest's decision to withhold payments of access charges is an acceptable remedy when allowed by tariff." *Id.*[12]

Based on these representations as to the IUB's decision, Qwest argued to the Court that:

> **"This validates Qwest's decision to dispute payments under Sancom's switched access tariffs."**

Id. (emphasis added). Qwest went on to state that it will "supplement the record" once the IUB "final written decision" is released, *id.*, but plainly Qwest believes it already has obtained a final decision and is citing, quoting, and relying upon it as such before federal judges.

c. Qwest relied again on the IUB decision in another federal case styled *Northern Valley Communications, LLC v. Qwest Communications Corporation*, Case No.

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[10] Petitioners are not able to append a full copy of this document due to Qwest's assertion of confidentiality in that case the scope of which is not always easily discernible. The portion of that document quoted herein is provided.

[11] The Board never specified which tariffs it reviewed for its decision, and actually stated that "the conferencing companies were not end users for purposes of the Respondents' exchange access tariffs." Transcript at 3. Accordingly, given the IUB's obfuscation despite Petitioner's requests for clarification, the Commission must act.

[12] This assertion is a dangerous misstatement of material facts. The Board actually held that "withholding payment is not a preferred form of self-help in these types of economic schemes unless a tariff ... agreement provides withholding disputed amounts ... however, based upon the rulings that have already been made, no money is owed by Qwest to the Respondents and there is no need for any sanction." Transcript at 6-7.

09-1004-CBK (D.S.D. July 30, 2008). On August 24, 2009, Qwest filed a Response in Opposition to Northern Valley's Motion to Dismiss Counterclaims IV, V, and VI of Qwest's Proposed Amended Counterclaims in which it stated:

> The Iowa Utilities Board also recently issued a verbal decision (the written decision is expected shortly) and with regard to Qwest's discrimination claim stated as follows:
>
> On the question of whether these were discriminatory arrangements, I personally did not find them to be discriminatory, but maybe not for the reasons that the Respondents would have preferred. Because I did not consider the conferencing companies to be end users, I don't think the sharing of access revenues was discriminatory, although it might have been unreasonable. However, ironically, if Respondents had prevailed on their claims that the free conferencing companies were end users, I would have very likely found that sharing the access revenues would have been discriminatory unless all or similar potential customers could have entered into the same agreements ....

Exhibit E.[13]

Qwest does note as to this item that "this transcript is not a final decision" but that "it illustrates the basis of the claim[.]" *Id.* Indeed, the discrimination claim before the IUB plainly was mooted by the IUB's other final conclusions that the Iowa LECs do not serve "end users"; the statement by Board Member Hansen on which Qwest relies above can best be characterized as a concurring opinion. Qwest nonetheless appended the Transcript to this pleading in the *Northern Valley* case as support for its discrimination claim in that case. Its relatively reserved posture, on August 24, became a far bolder pronouncement of the IUB "decision" in its August 31 and September 15 submissions in *Sancom*.

Qwest cannot have it both ways. Qwest is representing to federal judges that the IUB made "decisions"upon which counts should rely — for example, that the

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[13] Petitioners append only the relevant portions of that document in order not to burden the record.

Farmers and Merchants Order is not good law — and thus must be bound by those representations. Having made such representations to federal tribunals, Qwest simply cannot come before the Commission, disavow its advocacy and assert that the IUB's actions are not reviewable. Such conduct severely imperils the integrity of the administrative process. The Commission therefore should not rely on Qwest's self-serving and conflicting representations in the Motion but rather should look to Qwest's federal pleadings as the true demonstration of how Qwest views the August 14 IUB decision — as *stare decisis* on the ultimate facts and conclusions of law resolving the question of whether terminating access should be paid to LECs.

CONCLUSION

For all these reasons, the Commission should deny the Motion and retain the comment cycle it adopted on August 20, 2009.

September 16, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edilma Carr, hereby certify that on this 16th day of September, 2009, the foregoing Petitioners' Opposition to Motion of Qwest Communications Company, LLC to Suspend Comment Schedule to be served on the following persons via ECFS, First Class Mail *, or electronic mail **:

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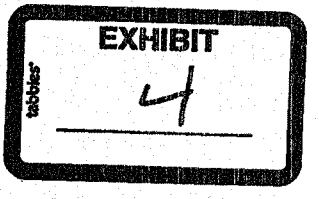
EXHIBIT A

AUGUST 14, 2009 IUB DECISION MEETING

Can you tell ___ that Court is back in open session for a decision meeting that I, I if I am not mistaken, I think an outline was handed out earlier on to the public on the issues that we were dealing with in our closed session this morning. So at this point, the Board will address each one of these issues separately and I think Commissioner Tanner is going to start out with tariff issues.

BOARD MEMBER TANNER: The first issue is: Did the Respondents violate the terms of their access tariffs when they charged Qwest, Sprint, and AT&T terminating switched access fees for the traffic at issue in this case? The first sub-issue related to this is the question: Were the Free Conference Calling Service Companies Considered "End Users" as defined by the Respondents' Tariffs? The Access Tariff provisions require that calls be terminated to an End User who has subscribed to the tariff before access charges can be assessed from calls to that end user. Before I go into detail on the findings of fact I want to note for the record that we had discussed whether certain cases precluded us from even addressing this issue, the Jefferson Telephone case. It is my opinion that Jefferson Telephone does not preclude us from addressing this issue because it did not directly address these tariff issues; instead, it was a broader issue regarding revenue sharing. Again, the FCC proceeding, Farmers & Merchants, I do not consider final decision at this point and any findings of fact or law based on that record one are not yet final and two I think that this Board has a more complete record than what was before the FCC. So I just wanted to get that out of the way. Based on the record, the conference companies did not subscribe to the Respondents' services. In particular, the Respondents did not bill the conferencing companies for service. The net billing argument is not supported by the evidence. There are no accounting records to support it. Respondents did not bill for end user subscriber line charges or universal service charges. There were no monthly billings for ISDN service or any of the other evidence that one would expect to see if net billing had ___ been in place. _____the Respondents offer amended agreements and back dated bills was unpersuasive. There is no evidence that those amendments reflected the original intent of the parties. Instead it was described by the conference calling companies as an attempt to change the deal. And in fact, you know, rather than being persuasive evidence, it raises a real concern that some of the parties may have been attempting to manufacture evidence after the fact in an attempt to create a false impression of the situation. Instead of treating the conference companies like end users, the Respondents shared profits with them and acted like they were in a joint business venture _____. Though profit sharing is not determinative of this matter, it simply shows no evidence they were netting the conference companies monthly bills against the shared profit. Finally, the Respondents also argue that filed tariff doctrine should allow them to go back and apply the tariff terms to the conferencing companies. But I believe that argument misses the point. These conference companies were never end users under the tariff, the tariff does not apply in these circumstances, so the filed tariff doctrine does not apply. For all of these reasons,



I find that the conference companies were not subscribing end users within the meaning of the term as it is used in the Respondents' access tariffs. That is my finding.

?: I agree.

BOARD MEMBER TANNER: The next sub-issue is did the toll traffic at issue in this case terminate at an end user's premises? The access tariff provisions require that the calls be terminated at the end user premises before access charges can be assessed from the relevant calls (28:02). It is my proposed finding that here the conference companies did not own or lease or otherwise control the premises where the conferencing equipment was installed, supporting the finding that calls are not being terminated at the end user premises. The Respondents make two main arguments in response. First they make the same net billing argument that was just rejected above. That is the lease payments for the space were netted out and the payments from the Respondents to the conferencing companies. Again there is no evidence to support that argument. _____payments reflecting that, no accounting records to support it, no monthly billings, and the conferencing companies did not control the space that was supposed to have been leased to them. The Respondents also point out that conference companies typically own the actual conference call bridges and some other equipment. This argument misses the point. The issue is whether the Respondents own or control the premises and there is no evidence that they did. For those reasons I conclude the traffic was not terminated at the end users premises in a manner that satisfies the requirements of the Respondents' access services tariffs. 26:48

?: I agree with the facts you cited in your reasoning and also _____ and I concur.

BOARD MEMBER TANNER: Another issue related to the tariff issue is did the toll traffic at issue in this case terminate within the Respondents' Certificated Local Exchange area? Under the relevant tariff provisions terminating access charges can only be assessed for calls that terminate in the LEC's local exchange area. This is an issue that does not equally affect all Respondents and the facts vary from one company to another. The first variation here involved international calling parties *~coughing~* and involved 5 of the 8 Respondents. A proper end to end analysis as set forth by the FCC of these calls supports a finding that none of these calls were actually terminated in the Respondent exchanges, thus terminating access charges should not have been assessed to these calls. The secondary issue involved the situation in which a Respondent billed terminating access charge as if the calls were terminated in a different exchange. This variation affects 3 of the 8 Respondents. Two of them attempted to justify the practice by claiming that it was foreign exchange service. That claim is totally unsupported by the facts. The conferencing companies did not order or pay for FX service and the calls are never actually transmitted to the alleged foreign exchange. There really was no valid argument for what these carriers did; it appears they were simply trying to maximize the access charges that they were applying to the *~coughing~* by actually moving the equipment to the other exchange. The third variation involves 2 Respondents, Great Lakes & Superior, which claim to

terminate calls in exchanges where they do not have a certificate to provide local exchange service. Great Lakes is certificated to provide service in Lake Park and Milford and these telephone numbers assigned to those exchanges to provide conference calling bridging in Spencer where it is not certificated (24:35). Superior's Articles of Incorporation limit it to providing local exchange service in Superior, but it also provided conference bridging in Spencer. The valid arguments were offered to try to justify the application of access charges to this traffic. In each of these situations I conclude that the ____ (24:07) traffic was not terminated in the respective Respondents certificated local exchange area and access charges could not be applied on those calls (23:58).

?: Yeah, I agree with your factual analysis _____ and concur also.

BOARD MEMBER TANNER: And I will editorialize on that last piece that was a tariff discussion but you know, I find, I know we're going to talk about public policy issues but I find the application that the arrangements where terminating access was applied to international calls (23:22) or access charges terminating in a applied to an exchange, foreign exchange, that the calls did not even terminated to be particularly egregious and I know we'll discuss public policy issues, whether these sorts of issues or arrangements should go forward in the future but I was particularly disappointed to see these arrangements were _____ (22:51). So, in conclusion, back to the tariff issue, for all the reasons we have discussed, the Board will direct *~coughing~* (22:41) to draft an order for the Board's consideration that finds that the conferencing companies were not end users for purposes of the Respondents' exchange access tariffs; therefore, access charges did not apply to these calls and should not have been charged to the Interexchange Carriers. The Order should order the Respondents to refund the illegally collected access charges to the Petitioner and Interveners. Because the precise amount of the appropriate funds (22:16) is not entirely clear on the record, the Board, in its order, should ask Qwest, AT&T, and Sprint to file their calculations of the amount of the illegal access charges they were billed by and paid to the Respondents. If they need additional discovery from the Respondents to make this calculation they should be authorized to conduct that discovery.

?: Thank you, Board Member Tanner. Anything else you want to discuss _____ (21:49) policy issues?

BOARD MEMBER HANSEN: Well, first I ___ agree with the, everything that ___(21:38) the order that's the logical _____ (21:33). The public policy issues really relate to what we should consider in terms of future policy. And there are some ____ (21:20) that are grounded in the events that have already happened. These really are _____ (21:07) issues. The first one is the question of whether the sharing of access revenues between the Respondents and a free calling service company whether that's an unreasonable and discriminatory practice. The Petitioners ask that we find the revenue sharing arrangement was unreasonable and discriminatory. Well, with the record in this case, I don't think we can find that revenue sharing on its face is

inherently unreasonable. It may be a warning or red flag indicating that something unreasonable is occurring, but there certainly could be situations where revenue sharing might be a valid business arrangement. For example, the access rates are intended to be set at the level that are intended to recover the costs of access services and the carrier's willingness to share a substantial portion of its access revenue with a conferencing company may be evidence that the carrier's access rates are in fact too high. But, I think we need to emphasize that this is not an indictment of access charges in general. This is a separate issue. And our, my concern anyway is that in these particular instances we have three important considerations. First of all, a carrier's access rates are set based upon a relatively low historical volume of access services (19:43). A second, the current and future volume of those services becomes much, much greater (19:39). And third, the carrier has substantial market power perhaps even monopoly power, over those services. In those particular situations, which I believe we find in this case, I believe that a sharing of those revenues is unreasonable. Now, I think we should also emphasize that if we find, we all agree that this was an unreasonable result, that finding would not be a reason to order refunds or retrospective relief because that decision has to be based on the tariff issues we have already discussed. It would just be a basis for addressing the situation in a forward going future-looking basis. So, I did find that in this particular case the arrangements were unreasonable. We were asked to find also if they are unreasonable and discriminatory. On the question of whether these were discriminatory arrangements, I personally did not find them to be discriminatory, but maybe not for the reasons that the Respondents would have preferred. Because I did not consider the conferencing companies to be end users, I don't think the sharing of access revenues was discriminatory, although it might have been unreasonable. However, ironically, if Respondents had prevailed on their claims that the free conferencing companies were end users, I would have very likely found that sharing the access revenues would have been discriminatory unless all or similar potential customers could have entered into the same agreements _____ (17:59). But, based on the finding that ____ this is an unreasonable arrangement in this particular case, I would like the order to direct that that we start a rule making proceeding, and start it very quickly. To consider amendments to our rules that are _____ (17:32) unreasonable _____ similar situations.

?: I agree with your analysis that you recommended just wanting to go back and ____ (17:20) emphasize the points you made and that's that this is not in any way an indictment of the access charges in general and that it is specific to this situation _____ (17:09).

BOARD MEMBER TANNER: I agree with that. The rule making that we envision has had volume access services and that that rule making will proceed independently and any other open issues we have regarding the CCL ? (16:50) order or any other _____(16:48) access charges. It's important that *~coughing~* that _____ (16:38) have a fair hearing and analysis of that issue separate from this and so this will make _____ (16:28) high volume services require the lower _____ than high volume. I would also note that it is our expectation that that we're making the

_____ (16:11) if not simultaneously, then within a week or so of this order, of the final order in this case. This is not going to be a situation where some time goes by before we initiate this rule making I think and I agree with the issues as laid out by Board Member Hansen. And I agree that it's not the sharing of revenues that troubles me it's that we have, when you get to the part ___ (15:38) what troubles me about this is that it's the high volume access, getting the access rates, that were supposed to be for low volume minutes, and so that I think is a _____ (15:21) issue, and that's what has to be ____ (15:18).

BOARD MEMBER HANSEN: The next public policy issue to consider is whether the Board should restrict conferencing services that promote pornographic or adult content on lines that can't be blocked by the end user. Qwest (15:03) us to restrict conferencing services that promote obscene content which can't be blocked. I can't emphasize enough that the Board should not, will not, and does not want to, regulate the content of telephone calls. However, the agency does have the authority to regulate access by minors to obscene calling services. Particularly, to protect and to promote the ability of parents to control that access by their own children. So, with that in mind, I think the Board should direct General Counsel to prepare an order for the Board's consideration that initiates rule making proceeding that will amend the Board's rules modeled on 47 U.S.C. §223 to restrict access to obscene calling, to allow access to be restricted in the case of obscene calling services.

?: I agree respectfully.

BOARD MEMBER TANNER: I agree as well.

BOARD MEMBER HANSEN: The next public policy issue is whether the Board should address Aventure's Federal Universal Service Fund support. Qwest and AT&T have asked the Board to take action against what they describe as Aventure's misuse of Federal Universal Service Funds support. The record in this case does indicate Aventure is alone among the Respondents in reporting conference cal ling lines for USF purposes. And in particular ____(13:35) includes test lines in its report and also appears to have overstated a number of exchanges ____ (13:29). However, the administration of the Federal USF is not our responsibility, not our jurisdiction. So I think we should report this information to the FCC for any further action as the FCC finds to be appropriate.

?: I agree respectfully.

BOARD MEMBER TANNER: I agree as well.

BOARD MEMBER HANSEN: Next one is if the Board should address the use of telephone numbering resources for Free Calling Service Companies. The evidence on the record indicates

that some of the Respondents have received telephone numbers for exchanges in which they are not certificated to provide service and others may have blocks of telephone numbers that are not being used to provide service. I think there is sufficient evidence in the record to require _____ (12:44) to commence reclamation of some of the numbers assigned to Great Lakes, which has no end users. The other 7 Respondents should be required in our final order to file reports with the Board within 10 days of that order establishing whether they have any numbering blocks ____ no end users assigned.

?: _____ (12:20) recommendations.

BOARD MEMBER HANSEN: Then we have the issue of rural exemptions. The question is should the Board make a declaratory finding regarding the rural exemptions claimed by Aventure Communication Technology, LLC, and Great Lakes Communication Corp. Qwest has asked the Board to make a finding pertaining to the federal rural exemptions claimed by those companies. The rural exemption provisions that Qwest refers to relate to interstate access charges. Our jurisdiction in that matter is limited to intrastate access charges. So, no finding on this matter is appropriate; however, I think we should refer the issue to the FCC because the evidence in our record would support a finding that Great Lakes failed to satisfy the requirements for the rural exemption in its claim. The evidence with respect to Aventure is not so clear and does not appear to support such a claim.

?: I agree respectfully.

BOARD MEMBER TANNER: I agree as well.

BOARD MEMBER HANSEN: And the last issue to discuss under forward looking public policy is ___ (11:01) the evidence in this record establishes that Great Lakes and Aventure have few, if any, customers and that they have provided services and exchanges that are not covered by their certificates. So, I think the Board should direct the General Counsel to prepare orders for our consideration that will require those carriers to appear before the Board and show cause whether certificates of public convenience and necessity that are issued pursuant to Iowa code Chapter 476.29 should not be revoked.

?: Yeah, I agree with the recommendation.

BOARD MEMBER TANNER: I agree as well.

?: The last major area we have dealt with today concerns counterclaims. And in this docket the first one concerns whether Qwest and Sprint engage in unlawful self-help by refusing to pay tariffed charges for switched access. There are two forms of self-help at issue here. The first is Qwest action withholding payment of disputed access charges. I recommend here that the Board should find that unilaterally withholding payment is not a preferred form of self-help in these

types of economic schemes ? unless a tariff ____(9:41) agreement provides withholding disputed amounts as part of _____ (9:37); however, based upon the rulings that have already been made, no money is owed by Qwest to the Respondents and there is no need for any sanction ____ (9:27). The second form of alleged illegal self-help involves claims that Qwest participated in call blocking and routed calls to other (9:18) and that Sprint deliberately chocked the traffic by moving conference traffic to _____(9:13) trunks. There is no credible evidence to support allegations that Qwest blocked calls. It is possible the calls were undelivered after Qwest ceased delivering calls and _____ (9:01) in which case Qwest is not responsible for any undelivered calls and this counterclaim should be denied. However, it does appear that Sprint did engage in call blocking be deliberately routing traffic to under capacity trunks without providing ___ (8:44). We have been asked to consider civil penalties for this action. Iowa code 476.51 requires the Board to provide the utility with written notice of a specific violation and gives us authority to levy civil penalties for subsequent violations. We should find that Sprint blocked calls associated with conference traffic and provide written notice to Sprint of the violation including notice that it would be subject to civil penalties for future violations.

BOARD MEMBER HANSEN: I concur.

BOARD MEMBER TANNER: I concur.

?: The next counterclaim is whether Qwest engaged in unlawful discrimination by making payments to some but not all of its customers. This counterclaim is based on the fact that Qwest sometimes pays volume based commissions to sales agents. The Board has previously held that revenue sharing is not inherently unreasonable so this counterclaim is unavailing. Moreover, Qwest is paying these commissions to sales agents, which is not at all similar to sharing revenues with a customer. Qwest _____ (7:35). Qwest's practices in this area simply are not relevant to the case.

BOARD MEMBER TANNER: I agree.

BOARD MEMBER HANSEN: I agree.

?: And finally, did Qwest discriminate against its wholesale carrier-customers by offering them unequal discounts. Reasnor argues that Qwest is engaged in unlawful discrimination by offering service discounts to wholesale customers. Again, that situation is not comparable to Respondents' activities in this case. Qwest is offering discounts in a competitive market that is deregulated and de-tariffed. Reasnor also argues that Qwest wholesale rates are in violation of the prohibition of geographic deaveraging but the prohibition applies to regional rates, not wholesale. Finally, Reasnor's claims that Qwest is somehow providing ____ (6:52) discount to ____ (6:49) was raised too late for this proceeding and will not be considered.

BOARD MEMBER HANSEN: I agree with all of this.

BOARD MEMBER TANNER: I do as well.

?: Any comments or questions for Staff? Any further comments or ____ (6:32)? At this time this concludes the decision meeting and _____ (6:27).

EXHIBIT B

DECISION MEETING

QWEST COMMUNICATIONS CORPORATION

vs.

SUPERIOR TELEPHONE COOPERATIVE, ET AL.

DOCKET NO. FCU-07-2

AUGUST 14, 2009

9:00 a.m.

ISSUE LIST

Tariff Issues

I. **Did the Respondents Violate the Terms of their Access Tariffs When They Charged Qwest, Sprint, and AT&T Terminating Switched Access Fees For the Traffic at Issue in This Case?**

A. Were the Free Calling Service Companies Considered "End Users" as defined by the Respondents' Tariffs?

B. Did the Toll Traffic at Issue in this Case Terminate at an End User's Premises?

C. Did the Toll Traffic at Issue in this Case Terminate Within the Respondents' Certificated Local Exchange Area?

Public Policy Issues

II. Is the Sharing of Access Revenues Between the Respondents and a Free Calling Service Company an Unreasonable and Discriminatory Practice?

III. Should the Board Restrict Conferencing Services that Promote Pornographic or Adult Content on Lines that Cannot be Blocked by the End User?

IV. Should the Board Address Aventure's Federal Universal Service Fund Support?

V. Should the Board Address the Use of Telephone Numbering Resources for Free Calling Service Companies?

VI. Should the Board Make a Declaratory Finding Regarding the Rural Exemptions Claimed by Aventure Communication Technology, LLC, and Great Lakes Communication Corp.?

Counterclaims

VII. Did Qwest and Sprint Engage in Unlawful Self-Help by Refusing to Pay Tariffed Charges for Switched Access?

VIII. Did Qwest Engage in Unlawful Discrimination by Making Payments to Some, But Not All of Its Customers?

IX. Did Qwest Discriminate Against Its Wholesale Carrier-Customers by Offering Them Unequal Discounts?

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

****

SANCOM, INC., a South Dakota corporation,

Plaintiff, Counterclaim Defendant,

vs.

QWEST COMMUNICATIONS CORPORATION, a Delaware corporation,

Defendant, Counterclaimant.

vs.

FREE CONFERENCING CORPORATION, a Nevada corporation,

Counterclaim Defendant

CIV. 07-4147-KES

QWEST'S SURREPLY TO REPLY (DKT. 182) IN SUPPORT OF SANCOM AND FREE CONFERENCING CORPORATION MOTIONS (DKT. 144, 151) FOR SUMMARY JUDGMENT

(Oral Argument Requested)

****

Qwest Communications Corporation n/k/a Qwest Communications Company, LLC ("Qwest") respectfully surreplies to Sancom's Reply (Dkt. 182) in support of its Motions for Summary Judgment. Sancom's Reply raised several new points, decisions and arguments it had not raised before. Qwest surreplies to respond to Sancom's new arguments.[1]

I. SANCOM'S NEW ARGUMENTS TO SUPPORT ITS TARIFF CLAIM FAIL.

A. *Jefferson*, *Frontier*, and *Beehive*: These FCC Decisions Presumed the Calls Satisfied Access Tariff Terms, and Thus They Have No Applicability to the Issues in This Case.

In its Motion, Sancom argued that the FCC has already found traffic pumping legal, premised upon the FCC's *7th Report and Order* and the 2007 *Merchants* decision. Qwest's Opposition shows those arguments lack merit. Opposition (Dkt. 163) at 24-46. For the same

[1] Qwest limits its surreply to respond to new arguments raised for the first time in the Reply brief; this does not imply that Qwest agrees with any of the remaining arguments in Sancom's Reply.

proposition, Sancom's Reply raises three new cases: *Jefferson, Frontier*, and *Beehive*.[2] Reply at 4-5. Both the FCC and the Iowa Utilities Board have found these cases inapposite to traffic pumping disputes. Presumably because these decisions are so easily distinguished and discarded, Sancom waited until its reply to cite them.[3]

Contrary to Sancom's arguments, *Jefferson, Frontier* and *Beehive* did not legalize traffic pumping. In those cases, AT&T presumed the local carriers were providing the tariffed services, and limited its argument to issues raised in a 1996 NPRM and a "1995 advisory letter issued by the Chief of the Enforcement Division." *Jefferson*, ¶ 13.[4] The FCC rejected those arguments, but in so doing expressly limited *Jefferson* to the specific facts and claims alleged:

> Although we deny AT&T's complaint, we emphasize the narrowness of our holding in this proceeding. ***We find simply that, based on the specific facts and arguments presented here***, AT&T has failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement with an end-user information provider. ***We express no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end-user customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements.***

Id. at ¶ 16 (emphasis added). In sum, *Jefferson* and its progeny have no applicability to this case.

The FCC itself has already rejected Sancom's reading of *Jefferson*. *In re InterCall, Inc.*, 23 FCC Rcd. 10731, ¶ 21, 2008 WL 2597359 (Rel'd June 30, 2008) (rejecting argument in the

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[2] *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001); *AT&T v. Frontier Commc'ns of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002); *In re AT&T Corp. v. Beehive Tel. Co., Inc.*, 17 FCC Rcd 11641 (2002).

[3] Sancom's counsel was aware of the decisions from *e.g.*, the Iowa Utilities Board action and advocacy to the FCC. Dkt. 182 Ex. B (at certificate of service); Dkt. 167 Ex. 92 (filing from the *Intercall* case). In addition, the April 27, 2009 report of Qwest's expert addressed the facts regarding *Jefferson*. *See* Dkt. 167, Ex. 3, pp. 46-47. Since Sancom did not raise *Jefferson* in its Motion, Qwest had no reason to discuss it in its Opposition.

[4] AT&T relied upon these exact arguments in each of the cases in the *Jefferson* line. *See In re Total Telecommc'ns Serv., Inc. et al. v. AT&T Corp.*, 166 FCC Rcd 5726 (2001), *aff'd in relevant part, AT&T Corp. v. FCC,* 317 F.3d 227 (D.C. Cir. 2003); *In re AT&T Corp. v. Beehive Tel. Co.,* 17 FCC Rcd 11641 (2002).

Universal Service Fund context that *Jefferson* had determined conference call providers are end users). Even the 2007 *Merchants* case, on which Sancom erroneously places reliance, notes the same. *In re Qwest Commc'ns Corp. v. Farmers and Merch. Mut. Tel. Co.*, 22 FCC Rcd 17973 ¶ 34, n. 115 (2007), partial reconsideration and further proceeding granted, 23 FCC Rcd 1615 (2008) ("We also find inapposite a number of cases cited by Farmers to suggest that the Commission has already found that it is lawful to impose access charges for the type of service at issue here. *See* Farmers' Legal Analysis at 10 (citing *...Jefferson ..., Frontier ... and Beehive* ...). In those cases, the issue of whether access charges were appropriate was never addressed. The parties and the Commission simply assumed that the LECs involved were providing access service, and the dispute was about the lawfulness of their rates."). In its verbal decision, the Iowa Board also rejected reliance upon *Jefferson*. Dkt. 179 (Ex. 14-B) ("It is my opinion that Jefferson Telephone does not preclude us from addressing this issue because it did not directly address these tariff issues....").

This case involves numerous claims not at issue before the FCC in the *Jefferson* line of cases; indeed, none of the issues before the FCC in *Jefferson* are before this Court. In complaint actions such as *Jefferson*, the FCC cannot decide any issues that were not pled with specificity. 47 C.F.R. § 1.720(a) ("Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity."); 47 C.F.R. § 1.721(a)(5) (a "formal complaint shall contain," *inter alia*, "a complete statement of facts which, if proven true, would constitute such a violation."). *See also AT&T Corp. v. FCC*, 317 F.3d 227, 237 (D.C. Cir. 2003) (distinguishing complaint filed with FCC and one filed in court). Thus, the only issues decided in *Jefferson* (and likewise *Frontier* and *Beehive*) were the two very narrow issues identified with particularity.

Here, Qwest has substantial evidence that the calls in question fall outside of the tariff, that Sancom is engaged in improper discrimination, that Sancom is involved in improper rebates, and that Sancom is violating Section 254(k) of the Communications Act. *See* Dkts. 163 and 164. These are the issues for decision in this case. None of these newly cited cases support Sancom's contention that application of its tariff is a matter of law to determine in Sancom's favor.

B. The FCC's 8th Report and Order Has No Bearing on this Case.

Sancom also argues that the FCC's Eighth Report and Order in the *Access Charge Reform* docket, 19 FCC Rcd 9108 (2004), legalizes its traffic pumping scheme. Reply at 6-8. The *Eighth Report* does not support Sancom in the slightest. The aspect of the *Eighth Report* that Sancom raises in its Reply addressed one very narrow issue, specifically: Does the fact that some providers of 1-800 services share originating switched access charges with some customers – customers who subscribe to and meet all requirements of the interstate access tariff – mean that the FCC should mandate a lower originating switched access rate for originating switched access minutes? *Id.* at ¶69 ("we conclude that it is not necessary immediately to cap competitive LEC access rates for 8YY traffic at the rate of the competing incumbent LEC."). The only issue the FCC addressed in the *Eighth Report* was whether it should obligate CLECs to charge a lower originating switched access rate for toll free 1-800 service (known as 8YY) than for traditional calling. The FCC did not address the legality of revenue sharing; the FCC did not address situations where the calling falls outside of the tariffs; the FCC did not address discrimination concerns; the FCC did not address 254(k) issues; the FCC did not address rebates; and the decision was limited to originating 1-800 calling and had no bearing on calls that terminate. Nothing about the decision is even remotely germane.

Just like the *Seventh Report and Order* discussed in Qwest's Opposition, the *Eighth Report* presumes that the CLECs are actually providing originating 8YY access to the hotels, airports and universities in accordance with the terms of their tariffs. *See, e.g., Eighth Report* at ¶¶ 66-72. In fact, one of the long distance carriers that provided comments to the FCC in that docket affirmatively stated that the hotels and universities paid the CLECs for the high-capacity dedicated facilities that the CLECs provided to them. *Id.* at ¶ 68, n.246. Here, in contrast, Sancom does not charge and the FCSCs do not pay for any services received from Sancom. Dkt. 165 (Qwest SOF) ¶¶ 100-105. In the *Eighth Report*, there was no dispute that the hotels and universities subscribed for service under the CLECs' access tariffs. Here, the FCSCs do not satisfy this requirement. Dkt. 163 at 4-24. Nor was there any dispute that the end user premises requirement was met – the calls were assumed to actually originate at the hotels, airports, and universities, not from equipment placed in the CLEC's central office. In this case, the end user premises requirement is not met. Sancom delivers the calls to equipment placed in its central office, equipment which Sancom itself had financed for Free Conference without charge of any kind. Dkt. 165 ¶¶ 42, 90-92, 129-32. These distinctions are critical, and show the *Eighth Report* has no applicability here.

In addition, the *Eighth Report* does not condone situations where a local carrier is involved in "excessive or fraudulent 8YY calls," or "artificially inflate[s] … 8YY calls." *Eighth Report* ¶70. In those situations, the FCC states that long distance carriers can initiate complaints. *Id.* at ¶71, n. 259 ("Because we conclude that the incentive for fraudulent generation of minutes is not as strong as the IXCs suggest, we reject claims that the complaint process is not a feasible or practical means of addressing potential abuses."). Here, Sancom's traffic pumping scheme exhibits these very qualities. The scheme is provided outside of tariffs; has resulted in excessive,

fraudulent, and artificially inflated traffic; and is premised on illegal rebates, illegal discrimination and illegal subsidies, all in violation of telecommunications laws. Sancom's agreement to kick back switched access revenues to its FCSCs partners resulted in: (1) the FCSCs encouraged the public to use their purported "free" calling services, (2) the FCSCs directed massive volumes of calls to telephone numbers assigned from Sancom, and (3) Sancom billed long distance carriers, including Qwest, for switched access that Sancom had not actually provided. The *Eighth Report* never addressed these issues and thus provides no refuge for Sancom.

C. The South Dakota Statutes Cited by Sancom Do Not Give Sancom License to Ignore the Terms of Its Local Tariff, and Sancom Does Not Show How the Statutes Aide Its Cause.

Sancom's Reply also raises two South Dakota statutes, SDCL 49-31-84, a statute regarding "discounts, incentives, services or other business practices necessary to meet the competition [in local exchange services]," and 49-31-4.2, which regards volume discounts. Sancom argues these statutes give it the right to provide free services to Free Conference irrespective of the terms of its local tariff, and to provide kickbacks to Free Conference irrespective of other state and federal laws. Reply at 8. As an initial matter, these statutes do not give Sancom the right to ignore the language in its local tariff; to the contrary, the filed rate doctrine obligates Sancom to those rates, terms and conditions. June 19, 2009 Order (Dkt. 137) at 7 ("The filed rate doctrine is equally applicable to rates filed with state regulatory agencies," citing *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 679 (8th Cir. 2009)). As Qwest showed in its Opposition, Sancom's business arrangement with Free Conference violates numerous provisions of its local exchange tariff; therefore the arrangement is not one for local exchange services.

Moreover, as to SDCL 49-31-84, Sancom makes no attempt to show this statute applies to any aspect of its business relationship with Free Conference – most notably the free services and kickbacks to Free Conference. The statute reads:

> It is in the public interest and essential that local exchange telecommunication companies over all of South Dakota continue to be viable providers of affordable local exchange services. ***Local exchange telecommunication companies receive substantial revenue necessary to support the exchange from a minority of their customers.*** Local exchange telecommunication companies must be allowed to compete to keep their profitable customers in order to maintain the viability of local exchanges. However, customers in rural and high-cost areas shall have access to telecommunications and information services, including interexchange services, that are reasonably comparable to those services provided in urban areas and that ***are available at rates that are reasonably comparable to rates charged for similar services in urban areas***.
>
> Notwithstanding any other provisions of chapter 49-31, any telecommunication company may grant any discounts, incentives, services, or other business practices necessary to meet competition.

SDCL 49-31-84 (in relevant part) (emphasis added). Sancom's Reply just offers the conclusory statement that this statute authorizes or encourages its business relationship with Free Conference. As Qwest's Opposition showed, Free Conference is not a local exchange customer because it does not purchase anything from Sancom; as a result, this statute has no applicability whatsoever. Even assuming *arguendo* that Free Conference were a local exchange customer, Sancom does not even argue and presents no facts to show how its relationship with Free Conference is a "practice necessary to meet competition." Sancom offers no argument, no evidence, no facts.

Nor could it. This statute plainly does not apply to Sancom's arrangement with Free Conference. First, the statute only applies to "compete to keep… profitable customers" of local exchange services. Free Conference is not a local exchange customer, and does not pay for local exchange services. Dkt. 165 (Qwest SOF) at ¶¶ 100-128. Offering services to Free Conference

for free is not a rate comparable to those offered in urban areas; to the contrary, it is not a rate at all. This violates federal law, which requires that local exchange services be offered for a "fee" and to the public. 47 U.S.C. § 153(46). Second, even if Free Conference were a local exchange customer, there is no competition against Sancom for that purported customer: even if Qwest Corporation, the incumbent LEC, were interested in traffic pumping (which it is not), it cannot compete for Free Conference's business because Qwest Corp.'s access rate is $0.055 per minute, which does not provide sufficient revenues for a kickback. Dkt. 47 (Amended Counterclaims) ¶11. Third, Sancom's provision of free services and revenue sharing is not a practice to "meet the competition:" Sancom has always provided free services and revenue sharing to Free Conference. Fourth, the statute cannot be read to allow the company to provide services free of charge to a "customer." Sancom's local tariff defines a customer as one "responsible for the payment of charges." Dkt. 165 (Qwest's SOF) at ¶81. Thus, one who does not pay cannot possibly be a customer. Fifth, the statute cannot be read to permit conduct that violates state laws (the carve-out is only for Chapter 49-31, not all state laws) or federal laws.

Sancom's argument as to 49-31-4.2 also ignores that this statute must be read in concert with the South Dakota statute that requires all of Sancom's offerings be made public:

> 49-31-12.8. Availability of telecommunications services information--Notification of adverse change in rates, terms, or conditions. ***A telecommunications company shall make available to any person, in at least one location, during regular business hours, information concerning its current rates, terms, and conditions for all of its telecommunications services.*** The information shall be made available in an easy to understand format and in a timely manner.

SDCL 49-31-12.8 (in part). Sancom entered into secret deals with its FCSCs partners and refused to provide the same opportunities to others. Dkt. 165 (Qwest SOF) at ¶¶48-51. Sancom cannot dispute that even if 49-31-12.8 applied to its provision of free services to Free

Conference, Sancom has not made the same offering available publicly, nor made that offering to other purported customers. *Id.* Thus, Sancom's provision of facilities to Free Conference free of charge violates the terms of its local exchange tariff and means Sancom did not offer Free Conference local exchange services pursuant to tariff.

D. Sancom's Access Tariffs Require an End User That Subscribes to Services from Sancom's Interstate Tariff; Delivery to an End User Premises; and Delivery Over a Common Line Ordered From the Local Exchange Tariff.

Sancom makes several arguments about its tariffs that are absolutely erroneous. Most are addressed and refuted in Qwest's Response, such as Sancom's erroneous claim that tariff interpretation is always a matter of law when scores of cases hold otherwise. Qwest responds here only to Sancom's new arguments raised in the Reply.

1. Without citation of any kind, Sancom argues "only carriers purchase services from an access tariff..." Reply at 10. This is contrary to the plain language of Sancom's tariffs, and contrary to opinions put forward by both party's experts. Dkt. 165 (Qwest's SOF) at ¶¶ 61, 62, 142. To be an end user, the tariff requires that one subscribe to an interstate service.

2. Sancom cites a Qwest brief before the Iowa Board and states (inaccurately) that Qwest admits that the only requirement for switched access is that calls complete to purchasers of local exchange service. Reply at 13, and Ex. B. This is baseless. Throughout the Iowa proceeding, Qwest argued (successfully) that for switched access to apply, calls must be delivered to an end-user, delivered to an end-user's premises, delivered over a common line (meaning a line ordered from the local exchange tariff), and terminated in the local carriers' certificated exchange. Dkt. 165 (Qwest's SOF) ¶7. Several requirements must be met, not just one. Sancom's attempts to overcome its expert's admission that the FCSCs did not subscribe to an interstate service is unavailing. *Id.* at ¶140.

3. Sancom claims that Qwest cites no authority to support its position that premises must be owned, leased, or controlled by the end user to be "end-user premises." Reply at 14-15. Sancom ignores the plain language of its tariffs. Dkt. 165 (Qwest's SOF) ¶64, 65, 90. The August 14, 2009 verbal decision of the Iowa Utilities Board for instance held that "the conference companies did not own or lease or otherwise control the premises where the conferencing equipment was installed, supporting the finding that calls are not being terminated at the end user premises." Dkt. 179, Ex. 14-B. While the Board was interpreting an intrastate access tariff, the definition of "premises" in the Iowa intrastate tariff was identical to that at issue before the Court. Dkt. 182 Ex. B at 6-7.[5]

4. Sancom argues that calls need not be delivered over a common line for access charges to apply, and claims access charges apply simply because calls are delivered. Reply at 15-16. Once again, Sancom ignores the plain language of its access tariffs which require delivery of calls over a common line, which the tariffs define as a line ordered from the "***business regulations of the general and/or local exchange service tariffs***." Dkt. 165 (Qwest's SOF) ¶¶66-67. Again, both parties' experts admit this fact. *Id.* Thus, it is not enough that calls complete; the call must traverse a common line ordered from the local tariff for switched access charges to apply.

5. Sancom cites comments Qwest filed with the FCC in a separate docket to suggest that Qwest admits switched access applies to all calls simply because they complete. Reply at 9, n. 19 and Ex. A. Sancom's expert raised the same baseless argument, which Qwest's expert definitively rejected. Dkt. 167, Ex. 4 at 45-48. Contrary to Sancom's arguments, Qwest's FCC comments made plain the charges only apply to "switched access service ***provided under***

[5] Sancom's counsel is aware of this verbal decision as they are counsel of record in that proceeding as well. *See* Dkt. 182 Reply Ex. B, at certificate of service.

tariffs." *See* Dkt. 182 at Ex. B, pp. 19, 29 (emphasis added). Qwest's comments therefore validate that switched access only applies when calls are delivered pursuant to tariff requirements.

6. Finally, Sancom goes so far as to say that Qwest's expert "admits" that Free Conference paid Sancom for local exchange services. Reply at 18-19. To make this point, Sancom seriously misstates the facts. The evidence shows that Free Conference never paid Sancom for any purported service (Sancom's own employees admit this fact). Dkt. 165 (Qwest's SOF) at ¶¶ 100-105. Instead, Sancom paid Free Conference, which is antithetical to the requirements of Sancom's local exchange tariff. *Id.* at ¶¶ 52, 138, 154. Sancom cites Qwest's expert's conclusion that Sancom made payments to Free Conference, not *vice versa*. Yet Sancom cites that opinion for the exact opposite proposition; namely, that Free Conference paid Sancom. This is totally misleading.

Sancom's new tariff arguments are just as flawed as the old. Sancom simply cannot succeed on its breach of tariff claim as a matter of law.

II. SANCOM'S NEW ATTEMPTS TO IGNORE THE DISPUTED ISSUES OF FACT ARE UNAVAILING.

A. Sancom's Motion to Strike and Authentication Argument Are Meritless.

Qwest's Opposition filings put forward overwhelming evidence showing there are disputed facts about many different requirements of Sancom's tariff claim. Dkts. 163, 165-167. Sancom's reply is puerile: Sancom effectively asks the Court (contrary to Rule 56) to ignore the mountains of evidence that contradict Sancom's arguments. Notably, Sancom's Reply does not take issue with the facts presented by Qwest. *E.g.,* Sancom did not file a response to Qwest's separate statement of facts, and its Reply does not attempt to rebut those facts. Rather than addressing Qwest's evidence, Sancom separately filed a motion to strike Qwest's statement of

facts. Dkts. 180-181. Qwest will respond to that argument in its response to Sancom's motion to strike.

B. Qwest's Use of the Deposition Testimony of Sancom's Employee Michelle Bortnem Is Expressly Authorized by Rules 56 and 32, Regardless of Whether Ms. Bortnem is a "Managing Agent" of Sancom.

Sancom's Reply also raises a new argument to avoid its employee's deposition testimony, claiming that the deposition of Ms. Michelle Bortnem is not admissible. Qwest put forward testimony of Sancom's billing coordinator, Sancom's Controller, Sancom's General Manager, and reports from Sancom's Board of Directors to show a genuine issue of fact exists about whether the FCSCs (including Free Conference) were Sancom's end users. Sancom's Motion intentionally ignored this evidence, and now argues that a portion of that testimony – the testimony of Michelle Bortnem, Sancom's billing coordinator – is not "binding" on the company. Reply at 21-22. Sancom's Reply does not, however, explain why a percipient witness's testimony would have to be "binding" on the company before it is admissible evidence. Ms. Bortnem is Sancom's employee responsible for overseeing customer service and billing customers. Dkt. 165 (Qwest's SOF) ¶99. She is thus a percipient witness on issues regarding what Sancom's local service bills are based upon (its tariff), Sancom's classification of FCSCs in a separate category of other than end user customers, and regarding Sancom not billing FCSCs for services. *Id.* at ¶¶100-113, 116, 119. Percipient employee testimony is admissible regardless of whether the employee constitutes a manager, officer or managing agent. *See, e.g., Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1014 (8th Cir. 2008); *Federal Deposit Ins. Corp. v. First Interstate Bank of Des Moines, N.A.*, 885 F.2d 423, 435 (8th Cir. 1989). *Cf.*, F.R.E. 801(d)(2)(D) ("a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship," is

not hearsay; rule is not limited to solely the manager, officer or managing agent of the party). The question of which employees can bind a company by their testimony is irrelevant to Qwest's use of this deposition testimony at the summary judgment stage. *See* Fed. R. Civ. P. 56(c); 32(a)(2) ("Any party may use a deposition ... for any other purpose allowed by the Federal Rules of Evidence"); *Diamonds Plus, Inc. v. Kolbe*r, 960 F.2d 765, 767-768 (8th Cir. 1992) ("a deposition need not be admissable [sic] at trial in order to be properly considered in opposition to a motion for summary judgment," and regardless, deposition inadmissible at trial can qualify as an affidavit at summary judgment phase).

In sum, Qwest can use this testimony to create a genuine issue of fact at summary judgment because it can be used "for any other purpose allowed by the Federal Rules of Evidence." Fed. R. Civ. P. 32(a)(2); *Stanphill v. Health Care Service Corp.*, 2008 WL 3927468, *2-3 (W.D. Okla. Aug. 20, 2008).[6] Sancom's cited cases do not address the use of a party opponent's employee deposition at summary judgment phase, and thus are inapposite.[7]

III. QWEST'S FIRST COUNTERCLAIM HAS ALWAYS ALLEGED UNLAWFUL SUBSIDIES; SANCOM'S COUNSEL WAS AWARE THAT THE CLAIM IS BASED ON SECTION 254(K); QWEST HAS STANDING AND SANCOM IS SUBJECT TO SECTION 254(K).

[6] Prior to the 2007 amendment of Rule 32(a), this provision was contained in Rule 32(a)(1). The Advisory Committee Notes of the 1980 Amendment of Rule 32(a) make plain that the addition of the phrase, "for any other purpose allowed by the Federal Rules of Evidence," broadened Rule 32(a) use of deposition transcripts to the same scope as the Rules of Evidence. For instance, Rule 801(d)(2)(D) allows adverse parties to introduce admissions by their opponent's "agent or servant" under the conditions stated in that rule. *See,* Amendments to the Federal Rules of Civil Procedure, effective Aug. 1, 1980, 85 F.R.D. 521, 529-530 (1980).

[7] None of the cases that Sancom cites address use of a deposition transcript on summary judgment as an admission of a party opponent by its agent or servant. *E.g., GTE Products Corp. v. Gee,* 115 F.R.D. 67, 68 (D.Mass. 1987), regards how a deposition of an organization can be noticed and in passing mentions possible use of depositions under (now) Rule 32(a)(3) without discussing (now) Rule 32(a)(2); *Moore v. Pyrotech Corp.,* 137 F.R.D. 356, 357 (D.Kan. 1991), regards where a deposition of a party's officer can be taken; *Reed Paper Co. v. Proctor & Gamble Dist. Co.*, 144 F.R.D. 2, 4 (D.Me. 1992), regards proposed use of depositions at trial with no discussion of use as statements under (now) Rule 32(a)(2) or FRE 801(d)(2)(D); *Young & Assoc's Pub. Rel'ns, L.L.C. v. Delta Air Lines, Inc.,* 216 F.R.D. 521, 522-523 (D.Utah 2003), regards use of deposition transcripts at trial proposed under (now) Rule 32(a)(3), with no analysis of (now) Rule 32(a)(2) or F.R.E. 801(d)(2)(D) statements.

Sancom's Amended Motion in one sentence argued that it is entitled to summary judgment on all of Qwest's Counterclaims. Dkt. 150. Qwest was therefore forced to brief its counterclaims devoid of any argument from Sancom. Qwest's Opposition noted that if Sancom on reply tried to raise arguments against Qwest's counterclaims, Qwest would seek to surreply. Dkt. 164 at 9. Qwest's Opposition shows that its first counterclaim is premised in part on Section 254(k) of the Communications Act, and that at the least, material fact disputes preclude summary judgment to Sancom. Dkt. 164 at 17, 24-25.

Sancom now argues that Qwest's citation to 47 U.S.C. § 254(k) is evidence that Qwest is trying to belatedly raise a new claim. Not so. Qwest's amended counterclaims have always alleged that Sancom kicks back a portion of its switched access charges to its FCSC partners to fund their conferencing services. Qwest's amended counterclaims (Dkt. 47) allege that Sancom has exclusive control over access to Sancom's customers (*Id.* at ¶11); Sancom's traffic pumping gives subsidies to the FCSCs (*Id.* at ¶25), and does so by inflating purported access traffic to Qwest and other long distance carriers (*Id.* at ¶40). Qwest's amended counterclaims also make plain that the FCSCs use these subsidies as the basis for their revenues. Dkt. 47, ¶25. Qwest also alleges a violation of Section 201(b), which requires a violation of the Communications Act (such as Section 254(k)), regulations or FCC decisions promulgated thereunder. *Global Crossing Telecommc'ns, Inc. v. Metrophones Telecommc'ns, Inc.*, 550 U.S. 45, 55 (2007). Thus, Qwest has always alleged Sancom's unjust and unreasonable practices under Section 201(b) premised upon an improper subsidy. While Qwest's counterclaims do not cite Section 254(k) by name, the Rule 8 notice pleading standard applies, and there has never been any confusion that Qwest's counterclaims contain such an allegation. *See Alliance Commc'ns Co-op., Inc. v. Global Crossing Telecommc'ns, Inc.*, 2007 WL 1964271, *16 (D.S.D. 2007) (applying Rule 8 to

Communications Act counterclaim); *CSC Holdings, Inc. v. Toporek*, 185 F. Supp. 2d 283, 286 (E.D.N.Y. 2002) (applying Rule 8 to Communications Act claim); *cf., AT&T Corp. v. F.C.C.*, 317 F.3d 227, 236 (D.C. Cir. 2003) (distinguishing between notice pleading applicable in federal court, vs. FCC complaint rule requiring pleading with specificity). Sancom's counsel admitted it knew about this allegation. Dkt. 165 (Qwest SOF) ¶188. Accordingly, this is not a new claim.

Sancom further argues that Qwest lacks standing and that Section 254(k) does not apply to Sancom, a CLEC (competitive local exchange carrier). Neither of these arguments has merit. Standing is not difficult to meet, and Qwest easily meets the requirements. The United States Supreme Court recently held that "as in all standing inquiries, the critical question is whether at least one petitioner has 'alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.'" *Horne v. Flores,* __ U.S. __, 129 S.Ct. 2579, 2593 (2009) (quoting *Summers v. Earth Island Institute,* __ U.S. ___, 129 S. Ct. 1142, 1148-49 (2009)). The court recently addressed standing in another traffic pumping case:

> 'Standing includes both a constitutional and a prudential component.' *Jewell v. United States,* 548 F.3d 1168, 1172 (8th Cir. 2008). The 'irreducible constitutional minimum of standing' consists of three elements: '[f]irst, a party must have suffered an 'injury in fact,' an actual or imminent concrete and particularized invasion to a legally protected interest; second, the injury must be fairly traceable to the challenged action of the defendant; and third, the injury must be redressable by a favorable decision.' *Id.* (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). 'Even if a [claimant] meets the minimal constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction.' *Id.* One of these limits is the rule that a person ordinarily does not have standing to assert the legal claims of third parties (the third-party standing rule). *Sprint Comm.,* 128 S.Ct. at 2544.

Northern Valley Commc'ns, L.L.C. v. Sprint Commc'ns LP, 618 F. Supp. 2d 1076, 1079-1080 (D.S.D. 2009). In that case, Sprint attempted to dismiss the counterclaims brought by one of Northern Valley's FCSC partners (Global Conference) against Sprint. While the FCSC only had an indirect relationship with Sprint, its only connection to Sprint being through Northern Valley,

the Court found the FCSC had standing to bring claims against Sprint because it claimed Sprint's actions had caused it harm:

> [T]he court rejects Sprint's reading of *UCAN* as requiring a claimant under § 207 of the Communications Act to allege a direct relationship with the defendant. Section 207 allows any person claiming to be damaged by a common carrier to bring suit for the recovery of damages. 47 U.S.C. § 207.

Northern Valley v. Sprint, 618 F. Supp. 2d at 1081 n.2.[8] This conclusion requires the exact same result here. Qwest asserts that Sancom's traffic pumping scheme – while involving various third-party FCSCs – is illegal conduct intended to harm Qwest and other long distance providers. Qwest does not seek to protect unknown third parties, but to protect itself from the direct harm caused to it. Qwest's Opposition to Sancom's Amended Motion shows that Sancom's conduct – the unlawful subsidies under Section 254(k) – are unlawful and have damaged Qwest. Dkt. 164 at 24-25. At the very least, Qwest has shown material disputes of fact on these issues.

Sancom's argument that Section 254(k) does not apply to CLECs is frivolous. Sancom makes this argument citing solely *Implementation of Section 254(k) of the Communications Act of 1934, as Amended,* 12 FCC Rcd 6415 (1997), and the regulations promulgated by that order. Sancom's position is directly contrary to what the FCC actually says in that order: while the FCC determined that the regulations would only address ILECs, "[w]e emphasize ... that all telecommunications carriers remain subject to the statutory prohibition against cross-subsidy." *Implementation of Section 254(k),* 12 FCC Rcd at 6421 ¶ 9. Thus the very FCC decision that Sancom claims as support says just the opposite: every telecommunications carrier is subject to Section 254(k). Even more egregious is Sancom's failure to cite the FCC's 2001 decision, which

[8] Moreover, when Sancom moved to dismiss Qwest's original counterclaims for lack of standing based on the filed rate doctrine, the Court found Qwest has standing on all of those claims, including this claim. Dkt. 31 at 7 (June 26, 2008 order). The Iowa Utilities Board also rejected a very similar argument. *In re Qwest v. Superior,* Dkt. FCU 07-02 Order (IUB May 25, 2007) at 12 (see Dkt. 167, Ex. 42).

expressly states that CLECs' access services are subject to Section 254(k). *AT&T Corp. v. Business Telecom, Inc.*, 16 F.C.C.R. 12312, 12339-40 ¶¶ 2, 60, 61 (2001). Sancom's Reply ignores *Business Telecom* even though Qwest informed its counsel of this decision in a separate traffic pumping lawsuit pending in South Dakota. *Northern Valley Commc'ns LLC v. Qwest Commc'ns Corp.*, Civ. No. 09-1004-CBK, Dkt. 63. There is no question that Section 254(k) applies to Sancom irrespective of its CLEC status.

III. CONCLUSION

For each of the reasons stated above, as well as those set forth in Qwest's Oppositions (Dkts. 163-164), Qwest respectfully requests that the Court deny Sancom and Free Conference's Motion for Summary Judgment in its entirety.

Dated this 15th day of September 2009.

/s/ Christopher W. Madsen
Filed Electronically

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CERTIFICATE OF SERVICE

I, Christopher W. Madsen, hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P. and that on the 15th day of September, 2009, I filed **Qwest's Surreply** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filings to the following attorneys:

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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

****

SANCOM, INC., a South Dakota corporation,

Plaintiff, Counterclaim Defendant,

vs.

QWEST COMMUNICATIONS CORPORATION, a Delaware corporation,

Defendant, Counterclaimant.

vs.

FREE CONFERENCING CORPORATION, a Nevada corporation,

Counterclaim Defendant

CIV. 07-4147-KES

QWEST'S STATEMENT OF FACTS REPLYING TO SANCOM'S STATEMENT OF FACTS (DKT. 162) ON QWEST'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to D.S.D. CIV. LR 56.1, Defendant Qwest Communications Corporation, n/k/a Qwest Communications Company, LLC ("Qwest") respectfully submits this separate Statement of Material Facts replying, paragraph by paragraph, to Sancom's Responses (Dkt. 162) to Qwest's Statement of Facts (Dkt. 142) filed in support of Qwest's motion for summary judgment (Dkts. 140-41). Qwest's original assertions of fact are identified in bold font, below. This document allows the Court to view Qwest's statements of undisputed material facts, Sancom's responses and Qwest's statements of facts in reply, all in one short document.

SANCOM'S ALLEGATION: As a preliminary matter, Sancom disputes Qwest's Statement of Material Facts in so far as it is improperly supported primarily by a single declaration from its lawyer. As explained in Sancom's Opposition to Qwest's Motion for Summary Judgment, much

precedent, or even persuasive. Qwest's position was recently validated by the Iowa Utilities Board ("Board") in a verbal decisional meeting on August 14, 2009. In that meeting, the Board stated the Merchants decision was not final, that the Board had the more complete record and a better ability to assess the facts, and strongly suggested it found the *Merchants* decision was procured by manufactured evidence. ***See Qwest Exhibit 14*** (attached hereto, Declaration of Charles W. Steese attaching an unofficial transcript of tape recorded open session of the Board's August 14, 2009 decision meeting). The Board concluded that the FCSCs were not end users of the eight Iowa LECs (under their local and intrastate tariffs) who were respondents to the case, that none of the calls were delivered to an end user premises, that the FCSCs were akin to business partners, and that Qwest's decision to withhold payments of access charges is an acceptable remedy where allowed by tariff. *Id.* This validates Qwest's decision to dispute payments under Sancom's switched access tariffs. Once Qwest obtains the final written decision, Qwest will supplement the record.

7. Qwest carries some traffic on behalf of other long distance carriers into telephone numbers assigned to Sancom. Steese Dec. at *Exhibit Qwest-11* (excerpt of Expert Disclosure of Derek Canfield) at ¶15 (submitted under seal pursuant to Qwest's Motion to Seal). When Qwest carries traffic for other carriers, which is known as wholesale carriage or least cost routing, Qwest charges other carriers a fee to carry such calls. *Id.* Qwest has written contracts with these other long distance carriers that give Qwest the right to modify the charges for which Qwest will carry the traffic on their behalf. Steese Dec. at *Exhibit Qwest-9* (Rule 30(b)(6) Deposition of Qwest Communications Corporation by its representative, Lisa Hensley-Eckert) at 253:4-261:9 (submitted under seal pursuant to Qwest's Motion to Seal).

SANCOM'S RESPONSE: This statement is undisputed insofar as it provides that Qwest carries traffic to Sancom on behalf of other IXCs with the expectation that Sancom will complete those calls for Qwest to Sancom's customers.

Dated this 31st day of August, 2009.

/s/ Christopher W. Madsen
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EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

NORTHERN VALLEY COMMUNICATIONS, L.L.C.,	*	
	*	Civ.09-1004-CBK
Plaintiff,	*	
vs.	*	**QWEST'S RESPONSE IN OPPOSITION TO NORTHERN VALLEY'S MOTION (Dkt. 59) TO DISMISS COUNTERCLAIMS IV, V, AND VI OF QWEST'S PROPOSED AMENDED COUNTERCLAIMS**
QWEST COMMUNICATIONS CORPORATION,	*	
Defendant.	*	

Qwest Communications Corporation[1] ("Qwest") opposes the Motion to Dismiss Counterclaims IV, V and VI for purported lack of standing, and counts IV and IV for failure to state a claim. Northern Valley Communications, L.L.C. ("Northern Valley") ignores Qwest's allegations that its interactions with third-parties have caused Qwest substantial injury. In two recent decisions – one involving Northern Valley itself – this Court rejected motions to dismiss for lack of standing even though the conduct involved interactions between two-unrelated third-parties. *See Northern Valley Commc'ns, L.L.C. v. Sprint Commc'ns LP,* 618 F. Supp. 2d 1076 (D.S.D. 2009); *Northern Valley Commc'ns, L.L.C. v. MCI Commc'ns Serv., Inc.*, 2009 WL 763570, *3-5 (D.S.D. March 19, 2009). Northern Valley's business relationship with its Free Service Calling Company ("FCSC") partners is premised upon illegality and targeted to harm long distance companies such as Qwest. Accordingly, standing exists. Moreover, Qwest's claims clearly state cognizable claims, and Northern Valley reverts to misconstruing applicable law in an effort to defeat the claims. The Court should deny the Motion to Dismiss.

[1] In January 2009, Qwest Communications Corporation became a Delaware limited liability company, Qwest Communications Company, LLC.

unjust discrimination. Qwest brought a similar claim to the Iowa Board, which found Qwest had standing to bring the claim. *See supra;* Steese Declaration at Exhibit 2. The Iowa Utilities Board also recently issued a verbal decision (the written decision is expected shortly) and with regard to Qwest's discrimination claim stated as follows:

> On the question of whether these were discriminatory arrangements, I personally did not find them to be discriminatory, but maybe not for the reasons that the Respondents would have preferred. Because I did not consider the conferencing companies to be end users, I don't think the sharing of access revenues was discriminatory, although it might have been unreasonable. However, ironically, if Respondents had prevailed on their claims that the free conferencing companies were end users, I would have very likely found that sharing the access revenues would have been discriminatory unless all or similar potential customers could have entered into the same agreements...

Exhibit 4. While this transcript is not a final decision; it illustrates the basis of the claim, and that Qwest has standing to bring the claim. While Qwest firmly believes the FCSCs are not end users, if they are end-users the scheme is premised on discrimination in violation of SDCL 49-31-11.[10] Given that the traffic pumping scheme is premised on illegality, and that scheme is targeted to harm long distance companies like Qwest, by billing the long distance companies for millions of dollars, Qwest has standing to bring the claim.

Citing no authority regarding the South Dakota laws in question, Northern Valley presumes that only a customer who is unjustly discriminated against can be injured by Northern Valley's violation of these laws. The express language of SDCL 49-31-11 shows Northern Valley is incorrect:

> No person or telecommunications company may unjustly or unreasonably discriminate between persons in providing telecommunications services or in the

[10] Northern Valley notes a South Dakota statute regarding volume discounts as permissible in intrastate access services. Memorandum at 3. Northern Valley does not attempt to explain how this statute would actually support Northern Valley's free services and revenue sharing with FCSCs; given the allegations of Qwest's counterclaims, including that Northern Valley's FCSC partners generate high-volume traffic for Northern Valley because Northern Valley shares its purported access revenues with them, and that this is a motion to dismiss stage, the statute is irrelevant.